UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BRIAD WENCO, LLC

and **Case No. 29-CA-165942**

FAST FOOD WORKERS COMMITTEE

RESPONSE OF RESPONDENT BRIAD WENCO, LLC TO THE BOARD'S NOTICE TO SHOW CAUSE

Jason E. Pruzansky, Esq.
Davis & Gilbert LLP
1740 Broadway
New York, NY 10019
(212) 468-4800 (Tel.)
(212) 468-4888 (Fax)
jpruzansky@dglaw.com (Email)

Counsel for Respondent

Respondent Briad Wenco, LLC ("Respondent" or "Briad") submits this response to the Notice to Show Cause issued by the Board in the above-captioned case on October 3, 2018 as to why the issue of whether Respondent's mandatory arbitration agreements unlawfully restrict employee access to the Board should not be remanded to the administrative law judge for further proceedings in light of the Board's new standard for evaluating facially neutral rules promulgated in the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (2017).

In sum, Respondent respectfully requests that the Board apply its new *Boeing* standard and find as a matter of law that Respondent's arbitration agreements do not violate the Act as they do not restrict nor can they be reasonably read to restrict employee access to the Board because the arbitration agreements clearly state in plain English that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ….**the National Labor Relations Board**…. in connection with any claim such employee may have against the company." (Emphasis added.)." The Supreme Court's decision in *Epic Systems*[1] confirming that the Federal Arbitration Act controls and directing that arbitration agreements be enforced as written further bolsters Respondent's position on this issue. At a minimum though, if the Board is not inclined to dismiss the remaining allegation in this action, the case should be remanded to the administrative law judge for further proceedings.[2]

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[1] *Epic Systems Corp. v. Lewis*, 584 U.S.___, 138 S. Ct. 1612 (2018).

[2] Relying on the Supreme Court's decision in *Epic Systems*, on October 3, 2018, the Board dismissed the only other previously remaining allegation in the complaint which was the allegation that Respondent's maintenance of arbitration agreements containing class and collective-action waivers violated the NLRA.

STATEMENT OF THE CASE[3]

Briad generally asks its new employees to sign as part of their new hire paperwork an arbitration agreement (hereinafter, the "Arbitration Agreement") which requires employees who execute it to waive their right to maintain class and collective actions in arbitral and judicial forums with respect to those claims that are subject to arbitration under the Arbitration Agreement.[4] As relevant to the remaining allegation in this case, the CGC alleges that the Arbitration Agreement runs afoul of the Act since, according to the CGC, employees who sign the Arbitration Agreement reasonably would believe that their signing of it "bars or restricts them from filing charges with the Board and/or restricts their access to the Board's processes."[5]

On July 6, 2016, the ALJ issued its decision (the "Decision") and concluded based on the now overruled *Lutheran Heritage* framework[6] that Respondent violated Section 8(a)(1) of the Act by issuing arbitration agreements which "restrict the employees from filing charges with the

[3] Respondent hereby adopts, as if fully set forth herein, the stipulated facts and exhibits contained in the Joint Motion To Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts submitted by Respondent, the Counsel for the General Counsel (the "CGC"), and the Fast Food Workers Committee (the "FFWC"). In the interest of brevity, Respondent respectfully refers the Board to the Joint Motion and Statement of Facts for background information on the parties to and procedural posture of this matter leading up to the ALJ's July 6, 2016 decision in this matter.

[4] The arbitration agreements at issue in this proceeding were attached as Exhibits 1 through 3 to the Factual Stipulation submitted by the parties and are also excerpted in large part in the ALJ's Decision (*See* Decision 2:19 – 11:3). The Factual Stipulation was attached as Joint Exhibit 2 to the Joint Motion To Transfer Proceedings. Briad maintains three versions of the Arbitration Agreement: a version for New York employees, a version for New Jersey employees, and a version for Pennsylvania employees. The three versions of the Arbitration Agreement are substantively identical other than the references to specific state laws contained therein. Any differences between the three versions are not material to the remaining matter at issue in this proceeding.

[5] Joint Exhibit 1(j) at ¶4(a).

[6] *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Board."[7] In the Decision, the ALJ further issued a recommended order requiring, among other things, that Respondent cease and desist from maintaining and enforcing the Arbitration Agreement.[8]

Respondent respectfully asks that the Board apply its new *Boeing* standard and reject the Decision and dismiss the Complaint in its entirety with prejudice because, as further set forth below, the Arbitration Agreement cannot reasonably be interpreted by employees to restrict them from filing charges with the Board or accessing its processes because paragraph 11 of the Arbitration Agreement explicitly states that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ….*the National Labor Relations Board*…. in connection with any claim such employee may have against the company." (Emphasis added.)

ARGUMENT

I. The Board Should Apply Its New *Boeing* Standard And Find As A Matter Of Law That Respondent's Arbitration Agreements Do Not Violate The Act As They Do Not Restrict Nor Can They Be Reasonably Read To Restrict Employee Access To The Board.

In its *Boeing* decision, the Board replaced the "reasonable construe" standard under *Lutheran Heritage* with a balancing test that considers "the nature and potential impact" of the rule on NLRA protected activity and the employer's "legitimate justification" for the rule.[9]

Pursuant to *Boeing*'s analytical framework, the Board should find that the Arbitration Agreement is lawful per se because when reasonably interpreted, it does not prohibit or interfere

[7] Decision 12:47-48, 13:1-2.

[8] *See* Decision 13:4-44, 14:1-16.

[9] *Boeing*, 365 NLRB No. 154, slip op. at 3.

with protected rights. Simply put, the Arbitration Agreement cannot reasonably be interpreted by employees to restrict them from filing charges with the Board or accessing its processes because paragraph 11 of the Arbitration Agreement explicitly states that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including but not limited to, ….**the National Labor Relations Board**…. in connection with any claim such employee may have against the company." (Emphasis added.) This explicit exclusion does not contain any caveats and is drafted in simple English so that it can be easily understood by even the most unsophisticated of lay people. Moreover, this exclusion is the first sentence in a standalone paragraph dedicated *solely* to describing the types of claims exempt from arbitration.

Notwithstanding this simple and unambiguous language, the ALJ (applying the now overruled *Lutheran Heritage* standard) erroneously concluded that an employee would need to "apply legal analysis" and "carry law books" to understand that the Arbitration Agreement does not prevent employees from accessing the Board.[10] In support of the forgoing conclusion, the ALJ mistakenly found that paragraph 2 of the Arbitration Agreement (which delineates the claims subject to the Arbitration Agreement) was "unequivocal" in stating that "any claim, controversy or dispute must be resolved by individual arbitration" and that therefore the unambiguous language in paragraph 11 (regarding employees' rights to access the Board) was to no avail.[11] In truth, even a cursory review of paragraph 2 reveals that it is not "unequivocal" by

[10] Decision at 12:24-27.

[11] *Id.* at 12:27-30.

any means with respect to the claims covered by the Arbitration Agreement as it explicitly carves out "claims expressly excluded from arbitration in Paragraph 11 of this Agreement."[12]

Moreover, the Fifth Circuit, when confronted with similar language in an arbitration agreement overruled the Board and explicitly held that "it would be unreasonable for an employee to construe the [arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite."[13] Here too, logic dictates that a Briad employee would not reasonably interpret the Arbitration Agreement to restrict his or her access to the Board when the agreement explicitly says the exact opposite.

Finally, particularly given the Supreme Court's decision in *Epic Systems*, even if the Board were to find that the Arbitration Agreement could reasonably be interpreted to restrict employees from accessing the Board – a finding that would be contrary to the plain language therein – the Board should still find the Arbitration Agreement to be lawful under *Boeing* because the legitimate justifications in favor of arbitration significantly outweigh any potential impact the Arbitration Agreement may have on protected activity. Utilizing arbitration as an alternative to court litigation promotes for *both* employers and employees an expedient, cost-efficient resolution of disputes while at the same time preserving an equitable means for resolving those disputes before an independent decision-maker. Efficiently adjudicating employment disputes via arbitration allows both employers and employees to avoid the significant time and resources associated with protracted litigation in court without reducing the relief available to the aggrieved party. In fact, the Supreme Court explicitly noted in *Epic*

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[12] *Id.* at 3:17-19.

[13] *Murphy Oil USA, Inc.*, 808 F.3d at 1020. *See also Solar City*, 363 NLRB No. 83, slip op. at 10 (2015) (Member Miscimarra dissenting) (noting that "[e]very employee who reads English would understand the [arbitration agreement has] no impact on NRLB charge-filing, since this is precisely what the [policy] says").

Systems that "in Congress's judgment arbitration had more to offer than courts recognized—not least the promise of quicker, more informal, and often cheaper resolutions for everyone involved," and that the FAA therefore established "a liberal federal policy favoring arbitration agreements."[14] Under these circumstances, the significant legitimate justifications for the Arbitration Agreement outweigh any minimal potential impact on protected rights, particularly given the clear unequivocal language in the Arbitration Agreement specifically notifying employees that nothing therein in any way restricts them from accessing the Board. Therefore, the Arbitration Agreement should be found lawful under the *Boeing* framework and pursuant to the Supreme Court's clear directive in *Epic Systems* – cited to by the Board in its Notice to Show Cause – that arbitration agreements be enforced as written pursuant to the FAA.[15]

CONCLUSION

For all the foregoing reasons, the Board should find as a matter of law that Respondent did not violate Section 8(a)(1) of the Act, and dismiss the Complaint in its entirety with prejudice. At a minimum though, if the Board is not inclined to dismiss the remaining allegation in this action, the case should be remanded to the administrative law judge for further proceedings.

[14] *Epic* Systems, 138 S. Ct. at 1621.

[15] *See Decision, Order and Notice To Show Cause* at pg. 2, citing *Epic Systems*, 138 S. Ct. at 1632.

Dated: New York, NY

October 16, 2018

Respectfully submitted,

/S/Jason E. Pruzansky
Jason E. Pruzansky, Esq.
Davis & Gilbert LLP
1740 Broadway
New York, NY 10019
(212) 468-4800 (Tel.)
(212) 468-4888 (Fax)
jpruzansky@dglaw.com (Email)

Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2018, a true and correct copy of the forgoing was filed with the Board via the Board's electronic filing system, and served by electronic mail upon the following:

Annie Hsu
Annie.Hsu@nlrb.gov
National Labor Relations Board, Region 29
Two MetroTech Center, Suite 5100
Brooklyn, New York 11201

Counsel for the General Counsel

AND

Ceilidh B. Gao
cgao@levyratner.com
Levy Ratner P.C.
80 Eighth Avenue
Floor 8
New York, NY 10011

Attorneys for the Charging Party

Dated: New York, NY

October 16, 2018

Respectfully submitted,

By:/S/Jason E. Pruzansky

Jason E. Pruzansky, Esq.
Davis & Gilbert LLP
1740 Broadway
New York, NY 10019
(212) 468-4800 (Tel.)
(212) 468-4888 (Fax)
jpruzansky@dglaw.com (Email)

Counsel for Respondent